DEFENSES TO POTENTIAL LEGAL ACTIONS FILED ON BEHALF OF ASTHMATIC CHILDREN SEEKING TO IMPOSE SMOKING BANS OR RESTRICTIONS IN PUBLIC PLACES

To date, a number of statutes or legal theories have been touted by anti-smoking activists as providing asthmatic children with the ammunition to force the owners of various public places to ban smoking. The right of asthmatic children to be free from exposure to environmental tobacco smoke ("ETS") has actually been pursued in only a handful of custody actions and in three related suits filed under the Americans with Disabilities Act of 1990 ("ADA").[1]

Anti-smoking activists have claimed that additional civil actions could be filed, presumably sounding in negligence, against the owners of fast-food restaurants or other public places and against international air carriers where smoking is permitted and asthmatic children allegedly suffer asthmatic attacks or other medical problems following exposure thereto.[2]

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1. Staron v. McDonald's Corp., Staron v. Burger King Corp., Staron v. Wendy's Old Fashioned Hamburgers of New York (D. Ct.) (filed March 30, 1993).

2. This survey of legal defenses does not include information relating to the science pertaining to the purported relationship between ETS exposure and asthmatic attacks. It should be noted, however, that any claim of injury by an asthmatic child following ETS exposure will face serious causation problems as there are a myriad of other triggers in a child's physical and emotional environment that have been linked to asthmatic attacks.

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In addition, during recent Congressional hearings addressing the issue of ETS and purported health effects, the U.S. Supreme Court decision in Helling v. McKinney was cited to support the suggestion that nonsmokers may be able to take action in court to prevent the development of future illness allegedly caused by ETS exposure.[3]

The legal defenses and counter-arguments to such claims are summarized below.

Child Custody

- The courts do not generally remove a child from the custody of a parent solely due to parental smoking habits. If a court were to do so, the door would be open to remove children from custody on the basis of less than "optimal"

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3. There is also legislation pending at the federal and state levels dealing with the issue of children and smoking policies. The PRO-KIDS Act of 1993 (S. 261), introduced by Senator Frank Lautenberg (D-N.J.), would restrict smoking to separately ventilated rooms in federal facilities serving children under the age of 18. A copy of the legislation with introductory remarks is attached.

In the Commonwealth of Pennsylvania, legislation was introduced on March 16, 1993, that would forbid smoking in automobiles when children under the age of 16 are present. H.B. 626, 176th General Assembly, Reg. Sess. (1993-94).

Neither of these measures contains language permitting individuals to sue for damages on the basis of alleged violations of their requirements. It is arguable, therefore, that such legislation could not form the basis for a private lawsuit brought by an individual seeking to impose smoking bans in affected indoor environments.

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dietary habits, proximity to EMF sources, exposure to television violence, social drinking, etc.

• Custodial parents have been ordered to refrain from smoking and to prevent others from smoking in the child's presence. Questions of policing such orders give rise to the specter of monitoring the child's urine for the presence of ETS markers or making informants of family members. Such measures could be characterized quite readily as unnecessarily intrusive and violative of privacy interests.[4]

ADA

• Nothing in the express terms of the ADA requires the imposition of smoking bans.

• The Department of Justice was required by the ADA to issue interpretive guidelines to those provisions of the ADA relating to places of public accommodation. The guidelines state, in relevant part, "[i]n establishing where separate areas are designated for smoking and non-

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4. In fact, an Australian judge, who had ordered a mother not to smoke in the presence of her asthmatic children, also ordered the father not to subject the children to nicotine tests. Canberra Times, August 10, 1993.

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smoking patrons, the required number of accessible fixed tables (or counters) shall be proportionately distributed between the smoking and non-smoking areas." 28 C.F.R., Pt. 36, App. A, § 5.1. It is clear that the entity required by the ADA to issue interpretive regulations and to provide technical assistance to covered establishments has interpreted the statute in a manner which would not require any place of public accommodation to impose smoking bans.

• Places of public accommodation may not discriminate against the disabled. Although disabilities are defined in the ADA as physical or mental impairments that substantially limit major life activities including breathing, each case brought under the ADA will be assessed individually, i.e., not all asthmatics will automatically be "disabled" for purposes of ADA litigation.

• The ADA does not invalidate any state or local law providing greater or equal protection to the disabled. In those states or localities which have adopted laws regulating smoking in public places, such laws are not preempted by the ADA. Where the owner of a public place complies with state or local laws pertaining to smoking,

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it is arguable that a plaintiff cannot state a claim upon which relief can be granted under the ADA.

- The ADA requires places of public accommodation to make reasonable modifications to provide access to individuals with disabilities. If banning smoking will cause a decline in patronage, such a modification is not reasonable. Some studies have shown that smoking bans in restaurants cause a decline in patronage.

- The ADA requires that places of public accommodation provide auxiliary aids and services and remove barriers to provide access to individuals with disabilities. According to the legislative history, Congress had structural barriers to access in mind when adopting the ADA. Cigarette smoke is not a structural barrier.

Negligence

- No child has yet been awarded damages in a case alleging smoke-induced health problems.

- Proof of causation and injury would be one of the biggest obstacles to a child's judgment against the owner of a fast-food restaurant or other public place. The

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child-plaintiff would have to prove that it is more probable than not that exposure to ETS while at the owner's facility caused some type of respiratory attack. Assuming exposure of limited duration and given that respiratory attacks are not uncommon among children and can be triggered by many sources, it would be difficult, if not impossible, to prove that it was the ETS in a particular location that was the exclusive cause of the attack. This will be particularly true with regard to fast-food restaurants where most customers spend a brief period of time either picking up a take-out order or eating their meal.

- It is questionable whether the owner of a public place where smoking is permitted would be held responsible for a parent's decision to smoke in the presence of the child or to seat the child in a smoking section when nonsmoking areas are also available at the site.

- Tobacco is a legal product, and smoking is a legal activity.

- Indoor air contains a number of constituents any one of which, in conjunction with inadequate ventilation, may cause respiratory distress. Forcing owners of public

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places to ban a single substance can create false assurances that the indoor air is now safe.[5]

Future Injury

- In Helling v. McKinney, No. 91-1958 (U.S. Supreme Court, June 18, 1993), the U.S. Supreme Court did not say that exposure to ETS constitutes cruel and unusual punishment as a matter of law or that ETS exposure unreasonably endangers future health. What the Court did say was that the prisoner in that case must be given the opportunity to prove in court that "the level of ETS to which he has been involuntarily exposed is such that his future health is unreasonably endangered."

The Court noted that scientific and statistical evidence of the potential harm and the likelihood of injury must also be accompanied by evidence that the risk of which the prisoner complains "is not one that today's society chooses to tolerate." Smoking policies are still subject to debate throughout the country; thus,

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5. An airline flight attendant, testifying during a recent Congressional hearing on the quality of air in airline cabins, observed that she has become more aware of air quality complaints since smoking was banned on most domestic flights in 1990. She suggested that air quality complaints prior to the ban were disguised by the smoke. House Subcommittee on Technology, Environment and Aviation, July 30, 1993.

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one cannot say definitively that society has chosen not to tolerate the presence of ETS in public places.

- Although some jurisdictions are beginning to recognize fear of future injury as a separate injury in tort cases, such a legal theory has not yet been universally adopted. A negligence claim does require a showing of actual injury in order for a plaintiff to recover damages.

Attachment

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